

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Date: January 10, 2006

Subject: Adoption Discussion of Proposed Regulation 18371 -- Local Ethics Training

I. Executive Summary

On October 7, 2005, the Governor signed Assembly Bill 1234 (Ch. 700, Stats 2005). AB 1234 requires (among other things) that all local agencies that provide compensation, salary, or stipend to, or reimburses the expenses of, members of a legislative body must provide ethics training to local agency officials by January 1, 2007, and every two years thereafter (applicable pages at attachment 2). The bill further provides that if an entity develops criteria for the ethics training, the Commission and the Attorney General's office must be consulted regarding the proposed course content.

Proposed regulation 18371 would set out the scope of the Commission's role in connection with the local ethics training required by the bill. The proposed regulation would also implement this role by defining "consultation" for purposes of consulting with the "Commission" in connection with the training.

This draft regulation was noticed to the public and interested persons on December 16, 2005, and is now being presented for adoption.

II. Background

In 1998, the Legislature passed and the Governor signed Assembly Bill 2179 (codified at Government Code sections 11146 - 11146.4).¹ These sections required state agencies to conduct ethics orientations for certain agency officials and employees. The 1998 law also required state agencies to "consult" with the Commission and the Attorney General "regarding appropriate course content." (Section 11146.4(b).) The new law has a similar consultation requirement.

In 1999, regulation 18370 was adopted by the Commission to implement the ethics training requirement for state officials. Regulation 18370 enumerated the topics covered by state ethics law, which the Commission would deem to be the minimum

¹ All statutory references are to the Government Code, unless otherwise indicated.

required content of an AB 2179-compliant ethics orientation. The regulation also established a process for state agencies to “consult” with the Commission on the actual substantive content of their orientation course on certain of these topics. The regulation provides two alternatives -- a review process and a quasi self-certification process for state agencies developing an ethics orientation.

In 2005, the Legislature enacted a similar ethics training requirement for certain local public officials. However, the law as applied to the locals differs in several aspects from the state requirements. First, the new law requires training on ethics laws *and* on ethical principles. Second, the law requires training on topics that differ from those set forth in regulation 18370. This is due to the fact that some of the laws that apply to state officials do not apply to local officials, and vice versa.

III. Scope of the Commission’s Role

The Political Reform Act (the “Act”)² is contained in Government Code sections 81000 through 91014. AB 1234 amended provisions in the Harbors and Navigation Code, Health and Safety Code, Military and Veterans Code, Public Resources Code, Public Utilities Code, and the Water Code. The bill only amended sections 25008 and 36514.5 of the Government Code and added sections 53232 through 53232.4 and sections 53234 through 53235.2. Of these government code sections, only sections 53234 through 53235.2 pertain to the Commission.

As noted above, only a few of the new statutes actually pertain to the Commission’s duties. Section 53235, for example, sets out the basic duties of local agencies to ensure that the agency’s members receive at least two hours of training on general ethics principles and ethics laws relevant to his or her public service every two years. The training may be in one or more training courses, or by means of sets of self-study materials with tests to be taken at home, in-person, or online. Providers of training courses must provide participants with proof of participation.

According to section 53235.1(a), each local agency official in local agency service as of January 1, 2006, must receive the required training before January 1, 2007.³ Local agency officials who commence service with the agency on or after January 1, 2006, must receive the training no later than one year from the first day of service with the local agency. Section 53235.2 requires the local agency to maintain records indicating the dates that local officials satisfied the training requirement and the name of the entity that provided the training for at least five years after the local official receives the training.

² The Act is contained in Government Code sections 81000 through 91014. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

³ Officials whose term of office ends before January 1, 2007, are exempt from the requirement. (Section 53235.1(a).)

Section 53235(c) imposes the following duty on the Commission:

“If any entity develops curricula to satisfy the requirements of this section, then the Fair Political Practices Commission and the Attorney General shall be consulted regarding the sufficiency and accuracy of any proposed course content. When reviewing any proposed course content the Fair Political Practices Commission and the Attorney General shall not preclude an entity from also including local ethics policies in the curricula.”

Section 53234(d) describes “ethics laws” to include (but not be limited to), the following:

“(1) Laws relating to personal financial gain by public servants, including, but not limited to, laws prohibiting bribery and conflict-of-interest laws.

“(2) Laws relating to claiming prerequisites of office, including, but not limited to, gift and travel restrictions, prohibitions against the use of public resources for personal or political purposes, prohibitions against gifts of public funds, mass mailing restrictions, and prohibitions against acceptance of free or discounted transportation by transportation companies.

“(3) Government transparency laws, including, but not limited to, financial interest disclosure requirements and open government laws.

“(4) Laws relating to fair processes, including, but not limited to, common law bias prohibitions, due process requirements, incompatible offices, competitive bidding requirements for public contracts, and disqualification from participating in decisions affecting family members.”

Staff believes that the Commission’s “consultation” duty only pertains to those sections that are in the Act. Some of the laws specified are not under the jurisdiction of the Commission but rather are under the jurisdiction of the Attorney General (See e.g., acceptance of free or discounted transportation by transportation companies). With respect to these provisions, the Attorney General’s office must be consulted. Further, while section 53235(b) requires training in both “general ethics principles” and ethics laws, staff believes that the consultation requirement for the Commission only pertains to the laws in the Act.⁴ The Commission has no consultation duty regarding “general ethics principles.”

⁴ While not explicitly discussed in the legislation, there is an intended distinction between ethics laws and ethical principles. One of the resources considered by the Legislature in connection with AB 1234 was the Institute for Local Self Government’s publication entitled “Of Cookie Jars And Fishbowls: A Public Official’s Guide To Use Of Public Resources” which described the distinction as follows: “the law

IV. Proposed Regulatory Action

Regulation 18371 is patterned after regulation 18370 which interprets the ethics training requirement for state officials. Proposed subdivision (a) of the draft regulation is an enumeration of the topics referenced in the bill. Some of the laws on the list are not under the jurisdiction of the Commission, but are under the jurisdiction of the Attorney General. However, staff believes that including a comprehensive list of *all* required ethics laws is useful and will assist local agencies in complying with their duties under AB 1234.

Note that since the regulation was noticed for public comment, new language has been added (indicated by shaded text). The revisions to subdivision (a) were generated by comments received at a meeting with local agency representatives and the Institute for Local Self Government. They noted that the new statutes also required training in ethical principles, separate and apart from training in ethics laws. It was also noted that the bill expressly allowed local agencies to tailor the core topics covered in the training to the duties of the officials receiving the training. Staff agrees with both these points and has added language to subdivision (a) reflecting this.⁵

Subdivision (b), in contrast to (a), sets forth the core legal topics that are contained in the Political Reform Act. New language similar to that was added to subdivision (a) has also been added to subdivision (b), for the same reasons noted above.

Subdivisions (c) and (d) set forth the actual “consultation” rules to implement the new law. These sections also contain the only decision points in the proposed regulation. Subdivision (c) is intended to be a “self-serve” consultation rule while subdivision (d) sets out a process where training materials can be submitted to the Commission for review. Subdivision (d) will require a greater commitment of resources by the Commission. Regulation 18370, which deals with state agency training includes both approaches as alternatives available to the trainer. The Commission may choose to adopt both, as is currently provided in regulation 18370, or may simply adopt subdivision (c) as the sole method of “consultation.”

Specifically, subdivision (c) allows the trainer to self-certify. The requirements under this section are that the trainer has reviewed the materials specified by the Commission for core content topics covered by the Political Reform Act on the Commission’s website, no more than 60 days in advance of the date the training is

merely sets minimum standards for conduct and decision-making. Just because an expenditure might be legal, within the meaning of an agency’s policies or prevailing law, the expenditure may not be ethical.”

⁵ We have also added a reference to section 87406.1, which provides a one-year “revolving door” prohibition for former employees of air pollution control districts and air quality management districts. This citation was inadvertently omitted from the noticed version of the regulation.

conducted, and that the training must be consistent with these materials. This will insure that the training will contain relatively recently updated material. The Commission has the option of either requiring that the trainer merely comply with the Commission's statutes and regulations (**Option 1**) in developing the training, or that the trainer consider specific legal information that will be specified by Commission staff on the Commission's website (**Option 2**). At this time, staff would envision at least outlines of the various core topics under the Act. In the future, in cooperation with the Attorney General's office, staff may be able to provide a more sophisticated and comprehensive training program.

Staff recommends Option 2. Option 2 allows Commission staff to determine what types of materials must be considered by the trainers. It also allows staff to maintain the materials and to alert trainers to changes in law. Further, the requirement would not create a significant burden on staff since many training materials on the core topics are already currently available elsewhere on the website.⁶

Subdivision (c) also has new language reflecting that the required training may be in separate segments so long as all the required training is completed by January 1, 2007, and every two years thereafter. This is consistent with subdivision (d) of section 53235 which provides that "[a] local agency or an association of local agencies may offer one or more training courses, or sets of self-study materials with tests, to meet the requirements of this section. These courses may be taken at home, in-person, or online." This clarifying language was added in response to a comment from Dr. Deni Elliott, Ethics Officer at the Metropolitan Water District of Southern California.

Subdivision (d) is the second decision point. That decision point asks whether the Commission would also permit trainers to obtain a more substantial review of their materials by Commission staff. The draft course materials would need to be submitted to the Commission at least 60 days prior to the date on which the agency proposes to conduct the ethics orientation and a response would be issued within 50 days of receipt absent special circumstances. The advantage to such a provision is that agencies subject to the requirement can have a thorough review of their materials by Commission staff. It is a current option with respect to state agency training courses.

On the other hand, the burden could be far greater than Commission staff can absorb. Passage of AB 1234 did not result in additional funding to the Commission. In light of the fact that the new requirement may apply to 58 counties, 478 cities, and 2,300 independent special districts,⁷ adoption of subdivision (d) could pull resources away from the other goals identified by the Commission in the recently adopted strategic plan. For

⁶ For example, the Commission's website currently offers: Can I Vote? Conflicts of Interest Overview; Campaign Contributions May Cause Conflicts for Appointees and Commissioners; Leaving Your State Job? Post-Employment Restrictions May Affect You; Gift limits for Local Elected Officers and Candidates for Local Elective Offices, Local Officials Specified in Government Code Section 87200, Judicial Candidates, and Designated Employees of Local Government Agencies, and Travel Guide for California Officials and Candidates.

⁷ Numbers according to the websites of the California County Supervisors Association, the League of California Cities, and the California Special Districts Association.

example, dedication of one or more attorneys to the review of the training materials could increase the time it takes staff to deal with its advice letter workload. **Consequently, staff is taking a neutral position with respect to the inclusion of subdivision (d).**

The language added at subdivision (e) was added in response to a comment letter from Shirley Grindle (December 22, 2005). She was concerned about the proposed regulation's failure to include a reference to local agency policies. She felt that the omission might be construed to be an elimination of this requirement. The intent of the regulation was to deal specifically with the Commission's duties under the new bill, and not all the requirements of the new law. However, to clarify that the regulation is not intended to eliminate or diminish requirements pertaining to laws and principles not in the Act, we have added subdivision (e) which explicitly states that the regulation does not affect instruction on "general ethics principles," "local ethics policies," or those ethics laws under the purview of the Office of the Attorney General."

Attachment 1: Comment letter from Shirley Grindle (December 22, 2005).

Attachment 2: Assembly Bill 1234 Legislative Digest and applicable pages from the bill.